

These are the tentative rulings for civil law and motion matters set for Tuesday, October 22, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, October 21, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0052999 Northern California Coll. Serv. vs. Performance Tile, et al

Plaintiff's Motion for Summary Judgment is denied.

Summary judgment may be granted where it is shown that the "action has no merit or that there is no defense to the action or proceeding." Code Civ. Proc. § 437c(a). The party moving for summary judgment bears the burden of persuasion that each element of the cause of action in question has been "proved," and hence there is no defense thereto. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. The moving party also bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. *Id.* If the moving party carries this burden, the burden shifts to the opposing party to make a prima facie showing that a triable issue of material fact exists. *Id.* "There is no obligation on the opposing party ... to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* ... necessary to sustain a judgment in his favor." *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 (emphasis in original; internal quotes omitted).

Plaintiff's separate statement contains only five facts: (1) defendant Performance Tile & Stone, Inc.'s ("Performance's") contractor's license was active from October 31, 2008 to February 9, 2010; (2) defendant American Contractors Indemnity Company ("ACIC") issued the statutory contractor's bond for Performance as of March 2, 2009; (3) the last line in original creditor Medimer Marble's book account is a payment by Performance dated March 2, 2009; (4) Performance's contractor's license expired on October 31, 2010; and (5) plaintiff filed its complaint on December 28, 2011. The facts set forth in plaintiff's separate statement fall substantially short of establishing every element of plaintiff's cause of action for a claim on a contractor's license bond. Business and Professions Code section 7071.11(c)(1) provides that "any action against a bond ... shall be brought ... [w]ithin two years after the expiration of the license period during which the act or omission occurred." Plaintiff submits no argument or authority to support its conclusion that because Performance last made a partial payment on its

account on March 2, 2009, that the “act or omission” for purposes of applicability of Business and Professions Code section 7071.11(c)(1) occurred on that date.

As plaintiff fails to sustain its burden to make a prima facie showing that there are no triable issues of material fact with respect to its claim on the contractor’s license bond, the burden does not shift to ACIC to establish a triable issue of material fact. Accordingly, plaintiff’s motion for summary judgment is denied.

2. M-CV-0057251 Koehler, Robert F., Jr. vs. Doerr, Maria

Plaintiff’s Motion for Leave to File Second Amended Complaint is granted. Where a motion for leave to amend is timely made, and will not prejudice the opposing party, it is an abuse of discretion to refuse permission to amend. *Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530. The court will not consider the validity of the proposed amendment for purposes of this motion. The parties will have the opportunity to attack the validity of the amended pleading after it is filed.

Plaintiff shall file his second amended complaint by no later than October 29, 2013.

3. M-CV-0058068 Wachs, Robin Lee et al. vs. Ostergren, Christy

Appearance required on October 22, 2013 at 8:30 a.m. in Department 40.

4. M-CV-0058823 Keh, Benjamin vs. Langsjoen, Jon, et al

Appearance required on October 22, 2013 at 8:30 a.m. in Department 40.

5. M-CV-0059188 Hidalgo, Peter vs. Farris, Jeffrey, et al

Appearance required on October 22, 2013 at 8:30 a.m. in Department 40.

6. M-CV-0059400 2001 Opportunity, LLC vs. Capital Gun Club, et al

Appearance required on October 22, 2013 at 8:30 a.m. in Department 40.

7. M-CV-0059419 Deutsche Bank National Trust Co. vs. Sholtz, Deen, et al

Defendant Deen Sholtz’s Demurrer to Complaint is sustained with leave to amend. The complaint in this action alleges that moving defendant Deen Sholtz (“Sholtz”) is either a former owner of the subject premises, or a renter pursuant to Code of Civil Procedure section 1161c. (Complt., ¶ 6.) If Sholtz was a tenant in possession under a month-to-month lease or periodic tenancy at the time the property was sold, 90 days’ written notice to quit is required pursuant to Code of Civil Procedure section 1161b. The notice to quit attached to the complaint as Exhibit B is a 3-day/90-day notice. However, the complaint alleges only that three days have elapsed since service of the notice to quit. (*Id.*) Given that the complaint does not allege that Sholtz is the former owner of the subject premises, and in fact sets forth that Sholtz may be a tenant in

possession, expiration of only the 3-day notice is insufficient to adequately allege a cause of action for unlawful detainer as against Sholtz.

Plaintiff may file and serve any amended complaint by no later than October 29, 2013.

8. S-CV-0025631 Harrentsian, Antranick vs. Correa, Sarah et al

Defendant's Motion to Quash Subpoenas was dropped.

9. S-CV-0028672 Schwarz, Suzann G. vs. Linkhart, Seth

The Demurrer to the First Amended Complaint is dropped. The moving party has been dismissed from this action.

10. S-CV-0029093 Hammer Lane Management, LLC, et al vs. HLMS, LLC, et al

The Motion for Leave to File First Amended Complaint was dropped.

11. S-CV-0031781 Wilson, Edwin vs. Food Service Insurance Managers, Inc.

Defendants' request for judicial notice is granted. Defendants' Demurrer to Plaintiff's Verified First Amended Complaint is sustained.

Defendants' demurrer is sustained without leave to amend with respect to all causes of action asserted against "The Halvorson Revocable Living Trust". A trust is not a legal entity, and has no capacity to sue or be sued, or to defend an action. *Stoltenberg v. Newman* (2009) 179 Cal.App.4th 287, 293.

Defendants' demurrer is sustained with leave to amend with respect to plaintiff's second cause of action for breach of contract. Plaintiff alleges breach of a "partially written and partially oral contract by refusing to purchase upon request Wilson's shares at the fair market value." Although the first amended complaint ("FAC") alleges numerous elements of the purported agreement, it is not possible to discern from the allegations which elements of the purported agreement are written, and which parts are oral. For purposes of the written portions of the contract, the terms must be set out verbatim in the body of the complaint, or a copy of the writing must be attached to the FAC and incorporated by reference. *Otworth v. Southern Pacific Transportation Co.* (1985) 166 Cal.App.3d 452, 459. The FAC does not attach any exhibits, and it is unclear whether any terms are set out verbatim in the body of the complaint, because the FAC does not identify which portions of the purported contract are written. Consequently, the second cause of action fails to state a valid claim for breach of contract.

Defendants' demurrer is sustained with leave to amend with respect to plaintiff's third cause of action for breach of contract. Again, plaintiff alleges a breach of a "partially written and partially oral contract by refusing to purchase Wilson's shares at the fair market value." (Complt., ¶ 18.) As set forth above, the FAC fails to identify which portions of the purported contract are written, does not attach copies of any writings, and does not set out terms of the

written portion of the agreement verbatim in the body of the FAC. For this reason, the third cause of action fails to state a valid claim for breach of contract.

Defendants' demurrer is sustained with leave to amend with respect to plaintiff's fourth cause of action for breach of the implied covenant of good faith and fair dealing. As set forth above, the FAC does not adequately allege the existence of a contract. Further, the FAC does not allege facts showing that defendants' conduct went beyond the breach of consensual contract terms, as already alleged for purposes of plaintiff's second and third causes of action for breach of contract. "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.

Defendants' demurrer is sustained with leave to amend with respect to plaintiff's sixth cause of action for dissolution of corporation. For purposes of this cause of action, plaintiff alleges that "[d]efendants contend and allege that FSIM is a closely held corporation under California law." (Complt., ¶ 29.) Corporations Code section 158 defines a "close corporation", and nowhere provides that a corporation may constitute a "close corporation" under its terms if the corporation or its shareholders "contend and allege" this to be so. The FAC makes no other allegations regarding FSIM's status as a close corporation. Accordingly, the sixth cause of action fails to state a valid claim for dissolution of corporation.

Plaintiff must file and serve any amended complaint by no later than November 12, 2013.

12. S-CV-0032381 Bowles, John vs. DFI Funding, Inc., et al

Defendant PNC Bank, N.A.'s ("PNC's") request for judicial notice is granted as to Exhibits 1-4, and denied as to Exhibit 5, as Exhibit 5 was not attached to the request.

PNC's Demurrer to Plaintiff's Complaint is sustained without leave to amend.

PNC asserts that it is the successor by merger to defendant National City Bank, erroneously sued as National City Mortgage ("NCM"). NCM is alleged to be the original trustee under the subject deed of trust. Plaintiff's first cause of action for fraud fails to state a valid cause of action against NCM. Plaintiffs fail to plead how, when and where any representations were tendered by or on behalf of NCM. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. Plaintiff fails to specify the identity of the person who made the alleged misrepresentations, his authority to speak on behalf of NCM, and when and to whom the representations were made. *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157. Further, this claim is barred by the applicable statute of limitations, and plaintiff fails to allege specific facts justifying a tolling of the statute of limitations.

Plaintiff's second cause of action for breach of contract fails to state a valid cause of action against NCM. The complaint does not allege the existence of an agreement between NCM and plaintiff to provide plaintiff with an affordable loan. Further, this claim is barred by

the applicable statute of limitations, and plaintiff fails to allege specific facts justifying a tolling of the statute of limitations.

Plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing fails to state a valid cause of action against NCM. For purposes of this cause of action, plaintiff alleges that defendants DFI Funding, Inc. and Action Foreclosure Services, Inc. breached their duty of good faith and fair dealing, but alleges no facts relating to NCM's purported breach of such a duty. Plaintiff fails to allege the existence of any agreement between NCM and plaintiff. Further, as noted above, any such claim would be barred by the applicable statute of limitations, and plaintiff fails to allege specific facts justifying a tolling of the statute of limitations.

Plaintiff's fifth cause of action for violations of Business and Professions Code section 17200, *et seq.* fails to state a valid cause of action against NCM. This claim is wholly dependent on the acts alleged for purposes of the remaining causes of action in the complaint, but plaintiff fails to allege any unlawful, unfair or fraudulent acts committed by NCM which caused damage to plaintiff.

Plaintiff's seventh cause of action for void contract fails to state a valid cause of action against NCM. As set forth above, plaintiff fails to allege the existence of any contract to which plaintiff and NCM are parties, and fails to allege that NCM seeks to enforce any contract against plaintiff, to which the defense of unconscionability would apply.

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint does not suggest on its face that it is capable of amendment and as the demurrer is unopposed, plaintiff has failed to make any showing that it can be amended to change its legal effect. With respect to the first, second, third, fifth and seventh causes of action, PNC's demurrer is sustained without leave to amend.

If oral argument is requested, PNC's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall.

13. S-CV-0032405 Ohlendorf, Craig vs. T.D. Service Co.

Appearance required. Defendant is advised that the notice of motion must include notice of the court's tentative ruling procedures. Local Rule 20.2.3(C).

Defendant T.D. Service Co.'s ("T.D.'s") request for judicial notice is granted. T.D.'s Demurrer to Complaint is sustained without leave to amend.

Plaintiff's first cause of action for conversion fails to state a valid claim. "The tort of conversion applies to personal property, not real property." *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1295. The notice of default that is the subject of plaintiff's complaint relates

to real property, not personal property. As the complaint alleges only acts relating to the foreclosure of real property, it fails to state a claim for conversion against T.D.

Plaintiff's second cause of action for cancellation of instrument fails to state a valid claim. The notice of default attached as Exhibit B to the complaint was recorded on June 23, 2009. At most, the statute of limitations applicable to a claim for cancellation of instrument is four years. Code Civ. Proc. § 343. As plaintiff's complaint was filed more than four years after the recordation of the notice of default, a claim for cancellation of instrument is barred by the statute of limitations. Plaintiff fails to allege any facts justifying a tolling of the statute of limitations. Plaintiff's claim is also barred by the failure to allege tender of the indebtedness owing under the deed of trust. *Karlsen v. American Savs. & Loan Ass'n* (1971) 15 Cal.App.3d 112, 117.

Plaintiff's third cause of action for breach of contract fails to state a valid claim. For purposes of this claim, plaintiff alleges that T.D. breached provisions of the deed of trust by recording the notice of default without providing notice to the borrower. Plaintiff fails to adequately allege a breach by T.D., as the deed of trust does not obligate the trustee to provide any such notice. Further, this claim is barred by the four-year statute of limitations applicable to a claim for breach of contract. Code Civ. Proc. § 337.

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint does not suggest on its face that it is capable of amendment and as the demurrer is unopposed, plaintiff has failed to make any showing that it can be amended to change its legal effect. T.D.'s demurrer is sustained without leave to amend.

14. S-CV-0032761 Yahkim, Tariq Amir - In Re the Petition of

Petitioner's Motion to Set Aside is denied. Petitioner's underlying petition for a name change was denied on the merits, and petitioner provides insufficient basis for a set aside of the denial.

15. S-CV-0032787 Myers, Michael, et al vs. Burgess, Holly S., et al

As a preliminary matter, the court notes that defendant James Macklin filed a notice of non-stipulation to this Commissioner on October 16, 2013. However, Local Rule 20.2(B) states that the failure to file a notice of non-stipulation at least five court days prior to the first law and motion hearing date will be deemed a stipulation to the Commissioner as a temporary judge pursuant to Code of Civil Procedure section 259(d) for all purposes other than trial. Thus, defendant's notice of non-stipulation is untimely and ineffective.

Plaintiffs' request for judicial notice is granted. Defendants James Macklin and Secured Document Research's (collectively "Macklin's") Demurrer to the First Amended Complaint is overruled.

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. No other extrinsic evidence can be considered. *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881. Macklin's demurrer is based primarily on facts and evidence outside of the complaint, and his own declaration and contentions that he did nothing wrong in providing services to plaintiffs. However, for the purpose of testing the sufficiency of the causes of action set forth in the first amended complaint, the demurrer admits the truth of all material facts properly pleaded. *Aubry v. Tri-City Hosp. District* (1992) 2 Cal.4th 962, 966-967.

Plaintiffs' first cause of action for breach of contract and eighth cause of action for negligence adequately allege the necessary elements to state each cause of action against Macklin. The question of plaintiffs' ability to prove the allegations is of no concern in ruling on a demurrer. *Committee on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 213-214.

Macklin shall file and serve his answer to the first amended complaint by no later than November 12, 2013.

16. S-CV-0032859 Reeve-Knight Construction, Inc. vs. Airco Mechanical, et al

Plaintiff's Motion for Order Consolidating Actions is denied without prejudice. The motion does not comply with California Rules of Court, rule 3.350. Specifically, the notice of motion does not list all named parties in each case, the names of those who have appeared, and the names of their respective attorneys of record, and was not filed in each case sought to be consolidated. Cal. R. Ct., rule 3.350(a)(1)(A), (C). Further, the motion was not served on all attorneys of record in all cases. Cal. R. Ct., rule 3.350(a)(2)(B).

17. S-CV-0032871 Degrinis, James vs. Ford Motor Company

Plaintiff's Motion to Compel Further Responses is continued by stipulation of the parties to November 12, 2013.

18. S-CV-0033215 Donahue Schriber Realty Group, LP vs. Siddiqui, Seema A.

Defendant Seema Siddiqui's Motion to Set Aside Default is granted. Defendant adequately demonstrates excusable neglect warranting a set aside of the default entered on September 4, 2013. Code Civ. Proc. § 473(b). Defendant shall file and serve her answer to the complaint by no later than October 29, 2013.

19. S-CV-0033249 Jacobs, Joan M. vs. Tully-Wihr Corp., et al

The Demurrer to the Complaint was dropped.

20. S-CV-0033494 Castaneda, Laura - In Re the Petition of

The Petition to Compromise Disputed Claim of Minor Alejandro Castaneda is denied without prejudice. The petition filed with the court does not include an acknowledgment of finality (pgh. 10), fails to attach all doctor's reports (pgh. 9), and omits Attachment 14a, Attachment 18a, and Attachment 19b(2), all of which are required.

21. S-CV-0033637 Castaneda, Laura - In Re the Petition of

The Petition to Compromise Disputed Claim of Minor Janeth Castaneda is denied without prejudice. The petition filed with the court does not include a signature page, and therefore is not verified. Further, the petition does not include an acknowledgment of finality (pgh. 10), fails to attach all doctor's reports (pgh. 9), and omits Attachment 14a and Attachment 19b(2), all of which are required.

22. S-CV-0033639 Jimenez, Claudia - In Re the Petition of

The Petition to Compromise Disputed Claim of Minor Nancy Jimenez is denied without prejudice. The petition filed with the court does not include an acknowledgment of finality (pgh. 10), fails to attach all doctor's reports (pgh. 9), and omits Attachment 18a and Attachment 19b(2), all of which are required.

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